No. 6948. Brewster V. Lake Superior District Power Co. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970 No. 6948

ROBERT L. BREWSTER,

Plaintiff-Appellant,

vs.

LAKE SUPERIOR DISTRICT POWER COMPANY,

Defendant-Appellee.

Appeal from the Order of the United States Court of Appeals for the Seventh Circuit

APPELLEE'S BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL

STATEMENT OF THE CASE

This action was commenced by plaintiff Brewster, pro se, on June 16, 1969, with the filing of the complaint with the United States District Court, Middle District of Florida, Orlando Division (#69-121). Service of process issued out of such Court was personally made upon defendant Lake Superior District Power Company (a Wisconsin public service corporation) (hereinafter "Company"). The Company retained Florida

counsel, which filed various motions to dismiss, among which was a motion to quash or dismiss grounded upon lack of jurisdiction and improper service. (App. Doc. No. 2) Subsequent to the hearing, an Order was entered quashing service of process without prejudice, but staying further action and granting leave to plaintiff to appeal a motion to transfer pursuant to 28 U. S. C. A. Sec. 1406 (a). (App. Doc. No. 2) Subsequently, on timely motion by plaintiff, an Order was entered on January 21, 1970, transferring this matter to the United States District Court for the Western District of Wisconsin. (App. Doc. No. 2)

Thereafter the Company was served with process issued out of said District Court for the Western District of Wisconsin on March 13, 1970. (App. Doc. No. 3) Defendant Company's Notice of Motion and Motions to Dismiss were filed and mailed to Plaintiff Brewster, April 13, 1970. (App. Doc. No. 4)

On April 27, 1970, plaintiff filed among other things his Notice of Motion for Default Judgment and Notice of Motion to Transfer. (App. Doc. No. 8) Pursuant to Affidavit and Motion of defendant Company's attorney, (App. Doc. No. 6) the Court directed a show cause order to plaintiff returnable May 5, (App. Doc. No. 5) 1970, regarding the matter of bond for costs; and thereafter plaintiff responded by posting security (App. Doc. No. 11) and the Order was quashed (May 5, 1970). (App. Doc. No. 12)

A hearing on all pending Motions was held before Honorable James E. Doyle on July 7, 1970. The Court denied plaintiff's motions for default

and to transfer, and granted motions of defendant to dismiss the complaint on Statute of Limitations bases as to Counts #1 and #2, and as to Count #3 for failure to comply with Rule 8 (a) of the Federal Rules of Civil Procedure. An Order to this effect was entered July 15, 1970, (App. Doc. No. 16) and judgment entered thereon July 16, 1970. (App. Doc. No. 17)

Notice of Appeal was filed July 27, 1970, (App. Doc. No. 20) and the record was filed and docketed with the Seventh Circuit Court of Appeals on September 10 1970. Following oral arguments in December of 1970, the Seventh Circuit Court of Appeals entered an Order (App. p. 1b) affirming the dismissal by the District Court of Counts #1 and #3 of the Complaint, but reversing as to Count #2 and remanding for further proceedings.

On appeal to the Seventh Circuit Court of Appeals, the plaintiff also raised Questions 1, 2, 4, and 5 as are presented to this Court on page 3 of Appellant's Jurisidctional Statement, and the Seventh Circuit Court of Appeals in its Order (App. p. 2b) specifically held there was no merit, based upon the record, as to any such contentions.

Relative specifically to the question of bias, we note here only that no such question had been raised by plaintiff either prior to or during the hearing on the pending motions in Brewster v. Lake Superior District Power Company (#70-C-31(S)) on July 7, 1970. (TRANS., p. 1-9) This case had been disposed of by Judge Doyle and it was only during the hearing of a subsequent case on the same day that the plaintiff for the first time raised such issue.

ARGUMENT

I

THIS COURT'S JURISDICTION ON APPEAL

Appellant bases his appeal on 28 U.S.C. 1254 (App. Jurisdictional Statement, p. 2 (iii)). On that same basis, appellee respectfully submits that the appeal should be dismissed on its merits.

28 U.S.C. 1254 states that "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

. . . (2) By appeal of a party relying on a state statute held by a Court of Appeals to be invalid as repugnant to the Constitution, treaties, or laws of the United States . . . ."

In the instant case, the Court of Appeals for the Seventh Circuit has not even considered the constitutionality of any state statute, let alone declared a state statute to be "invalid as repugnant to the Constitution." This much is admitted by appellant's jurisdictional statement, wherein it is stated that "this proceeding does not question the validity of any state or Federal statute . . ." (p. 3, App. Jurisdictional Statement).

In point of fact, the Seventh Circuit Court of Appeals relied on the following Wisconsin Statutes in making its decision: Wisconsin Statute Sec. 133.01; 262.19; and 196.03 (App. p. 2b). In the per curiam decision of Public Service Commission v. Batesville Telephone Co., 284 U.S. 578, this Court on p. 579 stated:

> "As the decision of the Circuit Court of Appeals merely applied the law of the State, no question is presented which gives this Court jurisdiction on appeal." (Emphasis supplied.)

Due to the fact that this appeal is taken contrary to the provisions of 28 U.S.C. 1254, Appellee respectfully requests that the appeal be dismissed on the merits pursuant to Supreme Court Rule 16 (a) which states as follows:

> "The Court will receive a motion to dismiss any appeal on the ground that the appeal is not within the jurisdiction of this Court, because not taken in conformity to statutes or to these rules."

II

PETITION FOR WRIT OF CERTIORARI

Appellee is mindful of the provisions of 28 U.S.C. 2103 which permit this Court to consider an improper appeal or an improvidently taken appeal as a petition for certiorari.

> "Sec. 2103. Appeal from State Court or from a United States Court of Appeals improvidently taken regarded as petition for writ of certiorari.
>
> If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of the state, or of a U.S. Court of Appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon

> the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari, it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs."

While it is the appellee's position that the appeal should be dismissed as hereinbefore set forth, if the Court should decide to consider such appeal rather as a petition for writ of certiorari, then it is appellee's position such petition must be denied. Reference is made to Supreme Court Rule 19 which states in part as follows:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." (Supreme Court Rule 19)

It is the position of appellee that in this case obviously no state court has decided any Federal question of substance, because no state court has been involved in the case. Appellant has made no showing of any conflict between the Seventh Circuit Court of Appeals and any other Court of Appeals, nor has there been a showing that any important question of Federal law has been decided that should be settled by this Court. There has been no showing, we submit, that any Federal question has been decided in a way in conflict with applicable decisions of this Court, and further that there is no showing that any Court of Appeals has departed

from the accepted or usual course of judicial proceeding or sanctioned such a departure from a lower Court so as to call for this Court's exercise of its power of supervision.

(A)

Dismissal of the Complaint

Regarding the dismissal of the Complaint, the record and Order of the Seventh Circuit Court of Appeals (App. p. 1b) show clearly that the questions involved were either the sufficiency of the Complaint under the applicable Federal rules of civil procedure, or as against the applicable Wisconsin Statute of Limitations. It is submitted that there is nowhere to be found any issue remaining of a substantial Federal nature such as to call upon this Court to exercise its powers of supervision in this case.

(B)

Non-Resident Bond

With respect to the matter of the non-resident bond, this question was fully briefed and argued before the Seventh Circuit Court of Appeals. That Court found (App. p. 2b) that plaintiff, by posting the required sum without objection (App. Doc. No. 11), had no standing to raise such issue on appeal. Subsequently, it is submitted that there can be no departure "from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision" (Supreme Court Rule 19) as to this question.

(C)

Bias of the District Judge

Again, with respect to the matter of alleged "bias" on the part of the eminent District Judge, this issue was fully briefed and argued before the Seventh Circuit Court of Appeals. That Court found that the "affidavit" filed by the plaintiff was both untimely filed and insufficient with respect to its substance. The case law regarding the duties of a District Judge upon presentation of a timely and meritorious affidavit or prejudice are legion, and it is submitted that there is not even an attempted showing of a decision on the part of the Seventh Circuit Court of Appeals in this case as being in conflict with the decision of another Circuit, or of this Court, and based upon the record (TRANS., pp. 1-9) and on the finding of the Seventh Circuit Court that the affidavit was both untimely and insufficient in nature, there is certainly no basis on the record for this Court to exercise its powers of supervision as to this question.

(D)

Motion for Judgment by Default

With respect to the denial by the District Court of plaintiff's Motion for Judgment by Default, the Seventh Circuit Court of Appeals held that the District Judge did not abuse his discretion in so ruling. That the granting or denial of such Motion is peculiarly within the sound discretion of the trial court needs no citation of authority, and appellee will not burden the Court with same. Of course, the first inquiry by a judge on such Motion

is whether the moving party has suffered by the failure of the opposing party to timely respond. The record filed herewith irrefutably indicates (TRANS., pp. 3-6) that appellant made no showing before the District Court of such prejudice, alleged none before the Seventh Circuit Court of Appeals, and no showing of such is made in the jurisdictional statement filed with this Court.

On this basis it is submitted that absent such showing, and on the basis of the Circuit Court's ruling that the trial court did not abuse his discretion in denying such Motion, there is no Federal question of substance herewith presented, nor would this be a proper case for this Court to exercise its powers of supervision with respect to this question.

(E)

Motion to Transfer

Relative to the denial of the Motion to Transfer from Wisconsin to either Florida or Indiana, the Court of Appeals held that the plaintiff made no showing, either before the District Court or before it that such Motion was validly grounded. Assuming authority in the District Court to transfer at all, again this decision, it is submitted, would be within the sound discretion of the trial court. The record will bear out that there was no showing by the plaintiff that either of the suggested transferee jurisdictions were appropriate by reason of situs of events complained of, residence of parties or witnesses, or convenience. The record in fact discloses that the only item of "out of state" flavor was the residence of the plaintiff.

Based upon such record, it is submitted that no Federal question of substance is apparent, nor would this be an appropriate case for this Court to exercise its powers of supervision with respect to this question.

III

CONCLUSION

Respondent respectfully submits that:

(1) The appeal must be dismissed pursuant to its Motion because the appeal is not within the jurisdiction of this Court in that it is not taken in conformity to 28 U. S. C. 1254(2).

(2) That if this Court treats this erroneous appeal as a petition for a writ of certiorari, said "petition" should be denied for the reason that there are no special or important reasons for granting same within the purview of sound judicial discretion, nor any other basis for invoking this Court's powers of supervision.

Respectfully submitted,

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Of Counsel

ORDER

Plaintiff-appellant Brewster commenced this diversity action on June 16, 1969 in the district court for the middle district of Florida. The action was transferred to the district court for the western district of Wisconsin. Defendant moved to dismiss for failure to state a claim. The district court entered an order and judgment dismissing the complaint as to counts 1 and 2 with prejudice and with costs and dismissing it as to count 3 without prejudice and with costs.

It appears from the complaint that plaintiff owned a motel property near Ashland, Wisconsin at which he desired electric utility service. Defendant is an electric power public utility serving the area.

Count 1 claimed damages for a breach of contract to provide service. The contract was signed May 6, 1958, ran for five years, and was allegedly breached in 1961 and thereafter. The district court was clearly correct in ruling that count 1 was barred by the Statute of Limitations because the complaint showed on its face that any breach occurred more than six years before the action was begun.

Count 3 claimed damages "resulting from an alleged conspiracy by numerous persons, cooperative, and corporations to prevent the lawful operation of a motel by the plaintiff." The defendant is the only conspirator identified. A number of other vague averments repeat in other terms the assertion that defendant conspired with others by action, inaction, or acquiescence, but give no more specific

information. The district court concluded that count 3 failed to comply with Rule 8 (a) F. R. C. P. in that it does not contain a short and plain statement of the claim showing that plaintiff was entitled to relief. The dismissal of this count was without prejudice, and we deem it well within proper bounds.

Count 2 claimed treble damages under Sec. 196.64, Wis. Stats., for defendant's alleged failure to perform its duty under Sec. 196.03 to render service, and averred that defendant refused to provide electrical service from 1961 to 1965. We are unable to sustain the ruling that count 2 shows on its face that it is barred, since it appears to claim refusal of service up to some date in 1965, less than six years before the action was begun. The district court stated that it was not deciding whether a cause of action was otherwise adequately stated in count 2 and the parties have not briefed the question on appeal. We do not decide it except to note that a cause of action for refusal of service has been recognized in Wisconsin. See Krom v. Antigo Gas Co. (1913), 154 Wis. 528, 140 NW 41, 143 NW 163, and Shepard v. Milwaukee Gas Light Co. (1857), 15 Wis. 318, 70 Am. Dec. 479. Accordingly the dismissal of count 2 will be reversed.

We find no merit in any other contentions of plaintiff: The district court did not abuse its discretion in permitting defendant to file its motion ten days late. Plaintiff showed no valid ground for transfer of the action to a different district. His affidavit of prejudice of the judge was late and insufficient. Having deposited security for costs he has no standing to complain that security was required.

Insofar as the judgment awarded costs to defendant and dismissed count 2, it is reversed and the cause remanded for further proceedings. In all other respects, the judgment is affirmed. No costs are awarded to either party on appeal.

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